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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 546

J. M. EASTLAND AND MONTEZ EASTLAND,
Petitioners,

v.

ELLIS CAMPBELL, JR., DISTRICT DIRECTOR
OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 23, 1962.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 35-64) is not as yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1962. (Appendix B, *infra*, p. 65). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Government, because it is the Government, is not amenable to the discovery rules (specifically Rule 34 of the Federal Rules of Civil Procedure) relative to the production of pertinent documents in a civil suit for refund of income taxes where the Government declares that such documents have been made a part of a criminal file to be used in a tax evasion action subsequently to be instituted against one of the taxpayers.

2. Whether the District Court is powerless to proceed with the orderly handling of discovery matters and trial of a civil income tax refund suit where the Government moves to stay all proceedings in such civil action until after final disposition of a criminal tax evasion action which it contemplates bringing against one of the taxpayers.

3. Whether, when the Government has refused to comply with an order of the District Court to produce pertinent documents in a civil income tax refund action, said Court may proceed under Rule 37 of the Federal Rules of Civil Procedure to remedy the impasse resulting from such refusal and strike the Government's answer to taxpayers' complaint.

4. Whether the District Court, upon striking the Government's answer, may then treat taxpayers' complaint as uncontroverted and take the allegations thereof as true and enter judgment for taxpayers accordingly.

STATUTES AND RULES INVOLVED

The pertinent statutory provisions and relevant Federal Rules of Civil Procedure are set forth in Appendix A, *infra*, pp. 29-34. They are as follows: 18 U. S. C., Section 3500, and Federal Rules of Civil Procedure, Rule 26, Rule 34, Rule 37, Rule 55 and Rule 81.

STATEMENT

This is a civil case; a suit for refund of income taxes instituted in the District Court pursuant to 28 U. S. C. Section 1340, by the Petitioners, J. M. Eastland and Montez Eastland, hereinafter called taxpayers. The controversy arises out of discovery proceedings under the Federal Rules of Civil Procedure. Taxpayers moved under Rule 34 to require the District Director of Internal Revenue, hereinafter referred to as the Government, to produce for inspection and copying, among other things, reports of Internal Revenue Agents who had examined taxpayers' income tax returns and records for the calendar years 1954 through 1957, inclusive.

After a hearing, the District Court granted the motion to produce such reports. However, the Government refused to comply with the Court's order; whereupon, after a hearing, the Court, under Rule 37, struck the Government's answer and entered judgment for the taxpayers on their complaint.

The Fifth Circuit reversed and remanded the case to the District Court. The nature of the case requires a detailed review of the facts and proceedings below.

A. Events Leading to the Motion for Production of Internal Revenue Agent's Reports

J. M. Eastland operates a chain of five and ten cent stores in Texas and Oklahoma. He and his wife filed a joint income tax return for 1957 which return disclosed an operating loss for the year. Such loss, when carried back to the year 1955 under the loss carryback provisions of Section 172 of the Internal Revenue Code of 1954, resulted in the elimination of their tax liability for 1955. Accordingly, on March 29, 1958, at the same time they filed their income tax return for the year 1957, taxpayers filed a claim for refund of the income taxes paid by them for the year 1955. (Appendix B, *infra*, p. 37.)

On April 1, 1959, Internal Revenue Agent, Martin L. Linderman commenced an examination of taxpayers' books and records for the purpose of determining the correct income tax liability for the years 1955 and 1957. (Appendix B, *infra*, p. 37.) Two weeks later, Mr. Linderman suspended his examination and in a few days returned with Special Agent Guy E. Brewton and the examination of taxpayers' books and records was expanded to cover the years 1954, 1955, 1956, and 1957. (R. 8, 13.)

The investigation continued during the following ten months and was completed on January 25, 1960. During this

period counsel for the taxpayers attempted to discuss and to determine the tax liability and or the adjustments, if any, which the Government proposed to make as a result of the investigation, but such efforts were to no avail. (R. 8-9.)

On December 5, 1960, this suit was brought against Ellis Campbell, Jr., District Director of Internal Revenue, in the United States District Court for the Northern District of Texas to recover the overpayment of income taxes for the year 1955 based upon the operating loss carryback from the year 1957. On January 31, 1961, the Government filed its answer in this civil suit admitting the jurisdictional facts but denying generally that a refund was due. (Appendix B, *infra*, p. 40.)

B. The Criminal Investigation

When Special Agent Brewton entered the case the taxpayers were aware that a criminal investigation was being conducted simultaneously with Mr. Linderman's examination of taxpayers' income tax liability for the years 1954 through 1957, inclusive. Mr. Brewton apparently completed his investigation on January 25, 1960, with a recommendation that the taxpayer, J. M. Eastland, be prosecuted for attempted evasion of income taxes for the years 1955, 1956 and 1957. (Appendix B, *infra*, p. 37.) However, Internal Revenue Agent Linderman's investigation of the tax liability was completed not later than December 15, 1959, because that is the date which appears on the report signed by Martin L. Linderman. (See Addendum, *infra*, pp. 15-17.)

After the completion of Mr. Brewton's investigation, the matter was forwarded to the Department of Justice with a recommendation of prosecution and, thereafter, the Department of Justice forwarded the matter to the United States Attorney for the Eastern District of Texas authorizing him to institute criminal proceedings against J. M. Eastland. Counsel for the taxpayers attempted to keep themselves abreast of developments in the criminal matter and consequently contacted the United States Attorney, Mr. Paul Brown, and requested that they be given an opportunity to discuss the matter with him before he presented the case to the grand jury. Subsequently, Mr. Brown advised that the case was to be presented to the grand jury in the near future and offered to confer with taxpayers' counsel in that regard. (Appendix B, *infra*, p. 38.)

Shortly after this civil suit was filed in the District Court for the Northern District of Texas, and on December 16, 1960, there was a conversation between Mr. E. T. Moore, one of taxpayers' counsel, and Mr. Brown together with his assistant, Mr. Joe Tunnell, who succeeded Mr. Brown as United States Attorney on January 1, 1961. The sole purpose of this conference was to discuss the prospective criminal case, and it had nothing whatever to do with the civil case which was pending in the Northern District. (Appendix B, *infra*, pp. 38, 39.) However, since the United States Attorney for the *Eastern* District normally would not receive notice of a civil suit pending in the *Northern* District, the taxpayers' counsel advised them at the conference that said suit had been filed. (R. 53-54.) At the hearing on th motion for production of

documents Mr. Brown and Mr. Tunnell both denied any recollection of Mr. Moore having informed them that the suit for refund had been filed in the Northern District. (Appendix B, *infra*, p. 39.)

Taxpayers' counsel urged Mr. Tunnell to review the criminal case thoroughly and to decline prosecution. In response, Mr. Tunnell stated that he would defer presentment of the case to the Grand Jury on January 3, 1961, in order to allow himself time to review the case fully and "in view of the further fact that I [Tunnell] would be taking over [as United States Attorney] just a few days prior to that time; * * *." (R. 50-51.)

C. The Motion to Produce Documents

On February 13, 1961, taxpayers filed a Motion for Production of Documents under Rule 34, of the Federal Rules of Civil Procedure, which, among other things, requested the production of the Internal Revenue Agent's reports prepared by Guy E. Brewton and/or Martin Linderman or by any other employee of the Internal Revenue Service, made with respect to the examination of taxpayers' income tax returns for the calendar years 1954 through 1957, inclusive. (R. 5-10.) Since taxpayers had been informed that the examination covered the years 1954 through 1957, inclusive, it was believed that the Revenue Agent's report would cover all four years and that adjustments might have been made in one year which would affect all the other years involved; e.g., adjustments to basis of assets acquired in earlier years for which depreciation deductions are claimed in 1955 or 1957. (R.

8-9.) It is customary practice of Internal Revenue Agents not to repeat the explanation of an adjustment in the report for each separate year where several years are thereby affected and are included in the same over-all report. Reference is simply made to the explanation of the adjustment in the year in which it is first made.

The taxpayers were greatly interested in pursuing to a final determination the question of their tax liability for the years in suit. (R. 8-10, 56-64, 67-74, 84-85.) A suit for refund of income taxes based on an operating loss carryback, such as in the instant case, in effect puts in issue each and every item of income, deduction and credit in the year of the loss as well as the year or years to which the loss is carried. Under the circumstances of this case the Government was the only party who could set up issues bearing on the claimed refund and since they had taken no action on taxpayers' claim it could be assumed they intended, at some unknown time, to take issue specifically therewith. On the other hand if the issues were not narrowed by elimination of uncontested items taxpayers would have to burden the trial by proving up all items of income and all items of expense in both 1955 and 1957 together with the underlying financial transactions in those years. (Appendix B, *infra*, p. 40.) Counsel for the taxpayers knew that the reports of the Internal Revenue Agents made with respect to their examination of taxpayers' income tax returns, books and records would furnish the information needed in the most convenient and usable form since a report of this type underlies nearly every tax controversy. Therefore, it would logically follow that produc-

tion of the internal Revenue Agent's report would be the first step in discovery proceedings. These were the considerations prompting the filing by taxpayers of the motion for production of such reports.

On February 21, 1961, the Government filed "Defendant's Answer to Plaintiff's Motion for Production of Documents and Motion for Stay of Proceedings" claiming, among other things:

> "3. That said files and documents in the custody of the United States Attorney for the Eastern District of Texas in connection with the criminal proceeding are privileged except as they might be ordered produced under the holding of *Jencks v. U.S.*, 353 U.S. 657 or Title 18, U.S.C., Section 3500, relating to production of documents in criminal cases."

Upon hearing before District Judge T. Whitfield Davidson the case was transferred to the United States District Court for the Eastern District of Texas, Tyler Division, by order dated February 21, 1961. (See Appendix B, *infra*, p. 41.) It was not until this time that the United States Attorney for the Eastern District had any official connection with the civil case.

D. The Hearing on the Motion to Produce Documents

On March 21, 1961, the motion to produce documents came on for hearing before District Judge Joe W. Sheehy. The Government introduced testimony to the effect that there was a criminal case which they planned to bring against tax-

payer J. M. Eastland. (R. 40-44.) The remainder of the testimony was directed toward the question of whether or not taxpayers' counsel had advised the United States Attorney's office in Tyler that they had filed a civil action in Dallas. (R. 44-54.) Taxpayers' counsel said he had informed them; Mr. Brown and Mr. Tunnell denied any recollection of it. It is irrelevant and spawned an illusory issue.

The Government at the hearing based its resistance to the motion on one point summed up by Assistant United States Attorney Lloyd Perkins as follows (R. 65):

> "For that purpose, we put on Mr. Brown and Mr. Tunnell. We submit that this is a criminal matter and not a civil matter; and we submit the Plaintiffs' attorneys knew that; and we submit that they never really pushed or really wanted to expedite this criminal matter and get that settled; and we submit that they filed a civil case in order to settle their civil liability and not really in good faith as a tax refund."

That this was the sole issue made by the Government in the trial court appears from the District Judge's statement in finding to the contrary (R. 69):

> "I will say this: The argument about there being a potential criminal case or not, as made by the Government, doesn't appeal to me. It's a matter of materiality here as to whether or not I should let you look at the matters; because if this is a bona fide civil suit, then the rules of civil procedure govern it; and if it falls within Rule 34, then you are entitled to have those documents produced. I don't care whether the criminal action is pending or whether the Government wants to bring one or what.

> "There is nothing in this statute that exempts the operation of Rule 34 in a civil case by virtue of the fact that there might be a criminal case pending or a potential criminal case."

The record shows a diligent effort on the part of District Judge Sheehy and taxpayers' counsel to exclude all matters which would be privileged or immaterial to the civil case. (R. 74-79.) In granting the motion to produce the Internal Revenue Agent's reports the Judge expressly limited the scope of his order to the reports of "Just the ones [agents] that actually examined them [taxpayer's books and records]: any reports made from actual examination. That's all I think you are entitled to have." (R. 76.)

The Court entered its order granting the motion in part and required the documents to be produced in the office of the United States Attorney on the following day at 2 p.m. March 22, 1961. (R. 16-17, 78.)

Despite the fact that no one else in the District Court-room had knowledge of what actually was contained in the Government files, neither the Government lawyers nor any other representatives of the Government made any effort to indicate whether there was a report of Special Agent Brewton and a separate report of Revenue Agent Martin Linderman or whether there was only one report covering both the criminal and civil aspects of the case. If the Government had admitted that there was a report of Martin Linderman in the file which dealt solely with the civil aspects of the case, the Rule 34 order would no doubt have been limited to the production of that document. As revealed in the Addendum to

this statement, the report of Revenue Agent Martin Linderman, dated December 15, 1959, contained all the apposite information which was sought by taxpayers in the discovery proceeding.

On March 22, 1961, the morning after the order to produce was entered, the Government served upon taxpayers' counsel a "Notice to Take Deposition" of J. M. Eastland to be taken on March 30, 1961. (R. 18.) Minutes later the Government filed with the Court its "Motion to Stay Order to Produce Pending Plaintiff's Compliance with Notice of Taking Deposition and Plaintiff's Giving Testimony" the overall intent of which was to attempt to reopen the matters disposed of at the Rule 34 hearing and otherwise to avoid the effect of the Order. (R. 19-22.) The Court immediately summoned counsel for both parties to his chambers where taxpayers' counsel was served with the said motion. Thereupon, the Court heard the motion and finding it to be without merit overruled same. This action was taken at 11:00 A.M. approximately three hours in advance of the time set in the Court's order for the production of the documents. (R. 22.)

E. The Government's Refusal to Comply With Order of the Court and Proceedings Thereafter

At 2:00 P.M. on March 22, 1961, counsel for taxpayers appeared at the office of the United States Attorney at Tyler, Texas, and requested production of the documents in accordance with the order of the Court. The United States Attorney, Mr. Joe Tunnell, informed taxpayers' counsel that he

was under orders from Mr. Fred Folsom of the Criminal Division of the Department of Justice, Washington, D. C., not to comply with the court's order and he refused to produce the documents. (R. 24, 83, 88.)

As the record shows, the refusal to comply with the court's order was *in toto*. No offer was made to produce Mr. Linderman's report dated December 15, 1959, which was concerned solely with the civil tax liability of the taxpayers and which would have complied with the court's order as limited at the Rule 34 hearing without disclosing any part of the Government's criminal file or any matter contained therein that might be privileged.

When the Government's refusal to comply with the Rule 34 order was called to the attention of District Judge Sheehy, he instructed taxpayers' counsel that while Rule 37 of the Federal Rules of Civil Procedure does not, in terms, require that a motion be filed thereunder when there has been a refusal to make discovery, he, nevertheless, wanted a motion filed in order to bring the matter to the Court's attention in writing so that a record might be made of it. (R. 83.)

Thus, in order to get the matter before the Court for hearing, taxpayers filed a motion on March 23, 1961, reciting the fact of the Government's refusal to comply with the Rule 34 order and requesting (R. 22.):

> "* * * that the Court, under Rule 37 of the Federal Rules of Civil Procedure, enter an order dismissing this action with prejudice; that judgment be entered with costs for the defendant; and for such other and further relief as the Court may deem proper."

On March 24, 1961, the Government filed "Defendant's Response to Motion to Dismiss" (R. 25-26) and that same day a hearing was held before District Judge Sheehy. Taxpayers' counsel explained to the Court that their motion under Rule 37 was principally intended to call the matter of the Government's refusal to make discover to the attention of the Court so that it could in its discretion make whatever order the Court thought was just and proper. (R. 83.) The reason for couching the motion in the terms actually used was stated to be (R. 86):

> "Well, we want this judgment, of course, to cut off any right of counterclaim—to cut off any counterclaims or cross-actions that they may have against this Plaintiff; in other words, to settle this tax liability for 1955. It's the type of thing that we might end up settling it that way anyway; but under the circumstances we now find ourselves in, why, we felt that this would be the best way to settle it."

Appealing to the sound discretion of the Court the Court was reminded that other methods and remedies were available under Rule 37. Discovery of the Internal Revenue Agent's report was not abandoned as is shown by (R. 87):

> "Another thing that I [taxpayers' counsel] was about to suggest in this situation: Why wouldn't the Court have the power to direct the United States Marshall to go to the Office of the United States Attorney, or wherever these records are, and seize and take them into possession, and bring them in so that we can see them? This is what the Court ordered. And certainly it seems to me that the Court has the power to order that."

Exercising the discretion vested in him under Rule 37 the court ordered that the defendant's answer be stricken from

the record, and thereupon entered judgment for the taxpayers for the relief sought in their complaint (R. 26-27).

Thereafter on March 29, 1961, the Government filed its "Motion to Alter or Amend Judgment" in two respects, first, to inject into the judgment a statement of the reason given by the Government for failing to comply with the court's order and second, a "certificate of probable cause" on behalf of the District Director of Internal Revenue so that the judgment would be paid by the United States Treasurer. The stated reason for failing to comply with the court's order was that the documents subject to the order were privileged (R. 28-31). On March 31, 1961, taxpayers filed their "Answer to Motion to Alter or Amend Judgment" agreeing to a certificate of probable cause but opposing the Government's motion in all other respects. On April 12, 1961, the motion was granted to the extent of the certificate of probable cause and overruled in all other respects (R. 31-33).

Thereafter, the Government appealed to the Court of Appeals for the Fifth Circuit which rendered its opinion and judgment on July 23, 1962, reversing and remanding the case to the district court. (Appendix B, *infra*, pp. 35-64.)

ADDENDUM

On November 29, 1961, the Internal Revenue Service mailed to the taxpayers what is known as a "30-day letter" which is the traditional notification of the determination of adjustments to the taxpayer's tax liability and affording him an opportunity to file a protest to the changes pro-

posed by the Internal Revenue Agent within 30 days. Attached to the aforesaid "30-day letter" was a photostat copy of an Internal Revenue Agent's report dated December 15, 1959, and signed by Martin L. Linderman. Mr. Linderman's Internal Revenue Agent's report was unusually voluminous and contained sixty-two pages in the main body of the report and seven extra-large accounting work-sheets containing depreciation schedules and the adjustments made by him to taxpayers' allowable depreciation. This report covered an examination of taxpayers' books and records for the years 1954, 1955, 1956 and 1957. The report related solely to the civil income tax liability of the taxpayers J. M. and Montez Eastland. The report contained numerous adjustments to taxpayers' tax liability in each year involving many thousands of dollars and resulting in substantial tax deficiencies for each year.

Mr. Linderman's report did not contain a single reference of any kind to facts, suspicions, or opinions concerning the criminal tax evasion case against J. M. Eastland.

It is noteworthy that Mr. Linderman's report was dated December 15, 1959, a full year before taxpayers filed suit for refund in the District Court on December 5, 1960, and fourteen months before the Motion for Production of such reports was filed by taxpayers on February 13, 1961.

Although Mr. Linderman's report is not a part of the record in this case, this is due solely to the Government's refusal even to admit the existence of the report until after the case had been fully submitted to the Court of Appeals for the Fifth Circuit. Coincidentally, the Government re-

leased the report for the first time by mailing said report to the taxpayers on the same day that the case was argued before the Fifth Circuit in Fort Worth, Texas, on November 29, 1961.

The controversy in this case has been confined almost entirely to the question of the production of the Internal Revenue Agent's report. The question will be so confined in this petition.

REASONS FOR GRANTING THE WRIT

The opening statement in the Government's argument in its brief to the Court of Appeals for the Fifth Circuit declares that (p. 14): "The proceedings and judgment below demonstrate an acute need for delineating some of the criteria which should guide the trial court in applying the pre-trial discovery procedures under the Federal Rules of Civil Procedure." The reversal by the Fifth Circuit of the lower court's decision only serves to magnify the need. This case involves important and substantial questions in the administration of justice in the Federal courts as well as in the administration and enforcement of the Internal Revenue laws of the United States. No less is involved than the question of when and under what circumstances the Executive branch of the Government may, on its own unilateral determination, hold itself exempt from judicial control of proceedings properly pending before the courts where the Government is a party thereto. Moreover, the conclusion of the Court of Appeals is in conflict with the decisions of this Court and other Courts of Appeals.

1. The decision below is in direct conflict with the decision of the Sixth Circuit in *Commissioner v. Licavoli (1958), 252 Fed. 2d 268, affirming the Tax Court, T.C. Memo Op., 15 T.C.M. 862*, where, under analogous circumstances, the Government refused to make a more detailed statement concerning the issues when ordered to do so by the Tax Court upon taxpayers' motion under Rule 17 (c) of the rules of that court, and thereupon the Tax Court struck the Government's answer and judgment for the taxpayer ensued. The decision below also conflicts, in principal, with the following decisions of this court; *Hickman v. Taylor, 329 U. S. 495; United States v. Reynolds, 345 U. S. 1; United States v. Yellow Cab Company, 338 U. S. 338; United States v. Oregon State Medical Society, 343 U. S. 326; Societe Internationale v. Rogers, 357 U. S. 197;* and *Hammond Packing Company v. Arkansas, 212 U. S. 322.*

In *Commissioner v. Licavoli, supra*, the tax years involved were barred by the statute of limitations unless the deficiencies in income tax were due to fraud. The Commissioner of Internal Revenue had set up the fraud issue in his answer and, upon taxpayers' motion under Rule 17 (c) of the rules of that court, the Tax Court ordered him to make a more detailed statement concerning the fraud issue. This the Government refused to do for substantially the same reasons given by the Government in this case, i.e., that to do so would be to disclose its evidence in a pending criminal prosecution against taxpayer Licavoli. Thereupon,

the Tax Court struck the Commissioner's answer setting up the fraud issue and, accordingly, judgment was entered for the taxpayer.

Although the Tax Court has its own rules applicable to proceedings in that Court, its Rule 17 is substantially similar in purpose to the discovery rules under the Federal Rules of Civil Procedure and upon a showing of "good cause" the court may order a party to file a further and better statement of the nature of his claim, of his defense, or of any matter stated in the pleadings.[1] Further, under that rule, if the party to whom the order is directed refuses to obey, the court may take remedial measures and strike the pleading.

The differences between the situation in *Licavoli*, *supra*, and the instant case are only technical differences in the applicable rules. The substance is precisely the same. The decision and judgment in the Tax Court, as affirmed by the Court of Appeals for the Sixth Circuit, had exactly the same effect as the order and judgment in the instant case.

[1] Rules of Practice Before the Tax Court of the United States:

"Rule 17. Amended and supplemental pleadings.—

* * * * *

(c) *Amendment ordered.*—

(1) *Occasion for.*—The Court upon its own motion, or upon motion of either party showing good cause filed prior to the setting of the case for trial, may order a party to file a further and better statement of the nature of his claim, of his defense, or of any matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the details desired.

(2) *Consideration of such motion.*—The Court, in its discretion, may set such a motion for hearing (see Rule 27 (a)) or may act upon it *ex parte*.

(3) *Penalty for failure to amend.*—The Court may strike the pleadings to which the motion was directed or make such other order as it deems just, if an order of the Court to file amended pleadings hereunder is not obeyed within 15 days of the date of the service of said order or within such other time as the Court may fix."

In that case, as here, the reasons advanced by the Government for resisting the taxpayers' motion and subsequently refusing to comply with the Court's order were that it had a criminal case against the taxpayer and did not want to disclose its evidence. The Sixth Circuit rejected this reasoning as follows (p. 273):

> "The Commissioner complains of the ruling for the reason that the taxpayer has been indicted in the District Court for willful evasion of income taxes for the years 1950 and 1951 and that the Government's disclosure of its evidence in this case prior to the criminal trial might seriously impair prosecution by affording the taxpayer an opportunity to concoct defenses and by minimizing the possible effectiveness of cross examination if he should take the stand. On this issue we agree with the comment of the Trial Judge that the Tax Court must confine itself to its own problems. We do not believe that a rule of pleading in civil actions applicable in a case when no criminal action is pending, should be held not applicable in another case merely because a criminal action is pending. *The trial of the civil case is independent of the criminal action.*" (Emphasis supplied.)

There an indictment was already pending against Licavoli whereas here such was not the case.

In the instant case the court below held directly contrary to the decision in *Commissioner v. Licavoli, supra*, and set the stage therefor in the first sentence of its opinion: "This civil action for a tax refund is tied in a tight knot with a criminal prosecution for fraud." (Appendix B, *infra*, p. 35.) While purporting to base its decision on lack of a

showing of "good cause" in the District Court, the majority opinion in the court below actually goes much further than this and limits the applicability of the discovery procedures against the Government by declaring that: "There are times however when the Government, *because it is the Government;* must withhold or postpone full disclosure. This is such a time." (Emphasis theirs.) (Appendix B, *infra*, p. 46.)

The court below attempts to distinguish this case from *Commissioner v. Licavoli*, *supra*, by pointing out that there the civil action was a direct result of a tax deficiency, alluding to a theory that where the Government has made a claim for tax deficiencies it has made some sort of election to expose itself to discovery proceedings. That no such election was intended is clearly demonstrated by the fact that the Government resisted the motion in the *Licavoli* case every bit as strenuously as it did in the instant case and with the same result: judgment for the taxpayer. In any event, for good measure, the Fifth Circuit held: "to the extent that this opinion differs from the opinions in *Frazier v. Phinney* and *Commissioner v. Licavoli*, we disapprove of those decisions." (Appendix B, *infra*, p. 54.)

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[2] (DC SD Tex., 1959), 24 F.R.D. 406. In *Frazier v. Phinney*, as here, the issue arose under the Federal Rules of Civil Procedure in the United States District Court. The entire question of good cause, relevancy and privilege was considered and production of the reports of the agents of the Internal Revenue Service was ordered. Good cause was the same as in the instant case. In *Frazier v. Phinney* and in *Commissioner v. Licavoli*, *supra*, criminal proceedings were then pending against the taxpayer. Though the suit in *Frazier v. Phinney* was based on a claim for refund of taxes paid as deficiencies, the Government resisted the motion on the same grounds as in the instant case and in *Commissioner v. Licavoli*, *supra*.

The controlling issues in this case cannot be successfully distinguished from those involved in *Licavoli*. The decisions of the two Courts of Appeals are irreconcilable.

2. For the reasons already stated, the decision below is erroneous. The court below did not simply hold that the taxpayers failed to show good cause for the production of the Internal Revenue Agent's reports. The thrust of the decision below is that good cause cannot exist for production of such reports where the Government declares that such documents have been made a part of the criminal file to be used in a tax evasion case subsequently to be instituted against one of the taxpayers. It is stated that this is based on administrative policy which gives priority to the public interest in law enforcement. (Appendix B, *infra*, p. 50.) We submit that the so called administrative policy is non-existent[3] and amounts to nothing more than a determination of legal strategy in each individual case. No known decision of this Court countenances such an administrative practice; on the contrary "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds, 345 U. S. 1.*

The court below concedes that the order of the District Court to produce the Internal Revenue Agent's reports would have been valid but for the contemplated criminal action. (Appendix B, *infra*, p. 47.) It is perfectly clear that production of Internal Revenue Agent Martin L. Linderman's report dated December 15, 1959, would have

[3] Compare *Commissioner v. Licavoli*, *supra*, and *Frazier v. Phinney*, *supra*, wherein the alleged administrative policy was obviously departed from for reasons which do not appear.

served "to narrow and clarify the basic issues between the parties". See *Hickman v. Taylor, 329 U. S. 495*, wherein this Court in establishing that the discovery procedures under the Federal Rules of Civil Procedure are to be liberally applied, further commented that: "The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." The findings of the District Courts in the exercise of the broad discretion vested in them to achieve the above mentioned purposes should not be overturned unless they are clearly erroneous. *United States v. Reynolds, supra; United States v. Yellow Cab Company, supra; United States v. Oregon State Medical Society, supra.*

The court below held that the various claims of privilege asserted by the Government were without merit. (Appendix B, *infra*, p. 49.) Nevertheless, the effect of the court's holding smacks more of "privilege" than of a lack of a showing of good cause. Thus, the court below in holding: "There is no basis here for the claim of executive privilege", (Appendix B, *infra*, p. 49) goes on to allow the substantial equivalent thereof in what might be called "administrative privilege" without surrounding it with any of the safeguards built in to the executive privilege doctrine. See *United States v. Reynolds, supra*. Moreover, the said administrative privilege, as exercised by the Government in this case, amounted to absolute privilege and plainly cloaked an Internal Revenue Agent's report with secrecy, when that report would have fully served the purposes of the

discovery proceedings in the District Court, and the production of which the Government cannot show would have prejudiced their criminal case.

Turning to the proceedings in the District Court which followed after the refusal of the Government to comply with the order to produce the Internal Revenue Agent's report, we note that the District Court was faced with an impasse. The Government made no effort to comply even in part with the Rule 34 order. In light of what is now known of the contents of the so-called criminal file, the Government can hardly continue to contend that its refusal to comply with the trial court's order was justified. The Government obviously should have offered to produce Revenue Agent Linderman's report, and then, upon the grounds that said report would give the taxpayers everything necessary to clarify the civil issues, they could have requested relief from the rest of the order to protect their criminal file.

Notwithstanding this, at the hearing under Rule 37 the Government offered no excuse for its refusal to comply with the court's order other than that the United States Attorney was under orders from the Department of Justice, Washington, D. C. not to comply. Nor did the Government offer anything in mitigation of its defiance of the court.

The District Judge approached his responsibility under Rule 37 in light of those circumstances. Neither the taxpayers nor the Court was in a position to proceed further with an orderly disposition of the case. Under Rule 37 the Court is

empowered to enter such orders as it deems to be just and, specifically, the Court is empowered to strike the Government's answer. See Rule 37 (b) (2) (iii), *infra; Societe Internationale v. Rogers, supra; Hammond Packing Company v. Arkansas, supra.* Following the lead of the Tax Court in *Commissioner v. Licavoli, supra,* which action was affirmed by the Sixth Circuit, the trial court struck the Government's answer to taxpayers' complaint. The striking of the Government's answer under Rule 37 was especially well adapted to dealing with the situation confronting the trial court. Since the discovery proceedings below were conducted for the principal purpose of determining what the issues were to be in the trial of the case, and what defenses or claims the Government may have had, if any, the Government's refusal to make discovery so vitally affected the entire proceedings as to render it useless to continue.

Turning finally to the entry of judgment for taxpayers by the District Court, this last step follows logically and correctly from what transpired before. The discretion vested in the District Court under Rule 37 to enter such orders as it deems to be just under the circumstances, including (but not necessarily limited to) the things enumerated in the Rule, authorizes and supports the judgment entered. The Court did not abuse its discretion. After the Government's answer had been stricken from the record, the allegations in the taxpayers' complaint were uncontroverted and were sufficient to support the judgment. *Reynolds v. U. S. (3rd Cir. 1951), 192 Fed. 2d 987, rev'd on other grounds, 345 U. S. 1.*

Moreover, the judgment was not a default judgment under Rule 55 since it was rendered upon the uncontroverted claims of the taxpayers which were taken as established under Rule 37. *U. S. v. Reynolds, supra.* See also *4 Moore's Federal Practice (2nd ed. 1950) Par. 37.04.*

3. It will bear repeating that in *Commissioner v. Licavoli, supra,* as in the instant case, the trial court required the disclosure of information in the Government file pertinent to the civil tax liability in issue. In both cases the Government refused to comply with the court's order. Finally, in both cases the Government's answer was stricken and judgment was entered for the taxpayers. The conflict between the decisions of the Sixth Circuit and Fifth Circuit in these cases needs to be resolved.

Moreover, the decision in the court below presents questions of considerable importance to the administration of justice in the Federal courts as well as the administration of the Internal Revenue laws which it is submitted warrant review and definitive adjudication by this court.

The question of priority of a criminal tax case over a civil case is nowhere established in the statutes or decided cases. Guidance from this Court would seem to be especially urgent in the case of the Tax Court which has nationwide jurisdiction.

We submit that the grant of a hitherto unknown administrative privilege permitting the Government to disrupt orderly discovery procedures in a civil tax case and to withhold disclosure of information which could otherwise be com-

pelled by the Federal Courts in the exercise of their jurisdiction would be an unwarranted weapon in the hands of the Department of Justice and the Internal Revenue Service. The need and justification for such an administrative privilege should be thoroughly reviewed in the interest of justice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

ALLEN E. PYE,
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Citizens First National Bank
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Tyler, Texas,
Attorneys for Petitioners.

October, 1962

CERTIFICATE OF SERVICE

It is hereby certified that service of three copies of this Petition for Writ of Certiorari has been made on the Solicitor General, Department of Justice, Washington 25, D. C., and that service of three copies thereof has been made on Hon. Louis F. Oberdorfer, Assistant Attorney General, Department of Justice, Washington 25, D. C., by air mail in accordance with the rules of the Supreme Court of the United States.

Dated: day of October, 1962.

ALLEN E. PYE
Attorney for Petitioners

APPENDIX A

18 U.S.C.:

Sec. 3500 [as added by the Act of September 2, 1957, P.L. 85-269, 71 Stat. 595] Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant,

the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interest of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Federal Rules of Civil Procedure:

Rule 26 [as amended December 27, 1946]. Depositions Pending Action.

* * * * *

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the de-

ponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

Rule 34 [as amended December 27, 1946]. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 20(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 37. Refusal to Make Discovery: Consequences.

* * * * *

(b) Failure to Comply with Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey * * * an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, * * * the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders

except an order to submit to a physical or mental examination.

* * * * *

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other mat-

ter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

* * * * *

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Rule 81. Applicability in General.

* * * * *

(f) [as added December 27, 1946]. References to Officers of the United States. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a collector of internal revenue, a former collector of internal revenue, or the personal representative of a deceased collector of internal revenue.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19057

ELLIS CAMPBELL, JR.,
District Director of Internal Revenue,
Appellant,

versus

J. M. EASTLAND and MONTEZ EASTLAND,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(July 23, 1962)

Before BROWN, WISDOM, and BELL, Circuit Judges.

WISDOM, Circuit Judge: This civil action for a tax refund is tied in a tight knot with a criminal prosecution for fraud.[1] With patience some formidable knots may be untangled. A famous one was cut. Here, the trial judge at-

[1] J. M. Eastland was indicted May 16, 1961. The case went to trial September 5, 1961. September 8, 1961, he entered a plea of guilty to one count.

tempted to cut away the criminal strand. We think that it would have been better to have waited and then patiently untangled the knot.

The controversy swirls around discovery. The plaintiffs moved to require the District Director of Internal Revenue to produce reports of agents who had investigated the plaintiffs for tax fraud. The reports were in the United States Attorney's criminal files. No assessment for deficiencies had been made. The Director asked for a stay of the motion in order to allow the criminal case to be disposed of first. He contended that the reports were privileged; that the motion for discovery was a cover-up to allow the taxpayers to inspect criminal files for information not available to them before the trial of the criminal case and then available only under the strict rules of criminal procedure and the "Jencks" Act. The trial judge held that the civil action was independent of any criminal action. He granted the taxpayer's motion, struck the defendant's answer and, without hearing any evidence in support of the complaint, gave judgment for the amount of the refund claimed, plus interest and costs. Rule 34, F.R. Civ. P., allows discovery of documents only by court order "upon motion of any party showing good cause therefor". Our decision turns on the facts bearing on good cause. We reverse and remand.

I.

The nature of the case requires a detailed review of the facts and proceedings below.

J. M. Eastland[2] operates a chain of five and ten cent stores in Texas and Oklahoma. He and his wife filed a joint tax return for 1957 in which they declared an operating loss exceeding their income for that year. The loss would result in eliminating their tax liability for 1955, if the loss were carried back to that year under the loss carryback provisions of Section 172 of the Internal Revenue Code of 1954. March 29, 1958, the Eastlands filed a claim for refund of all of the income taxes originally paid for 1955. April 1, 1959, an Internal Revenue Agent commenced an examination of the taxpayer's books and records for the purpose of determining the correct income tax liability for the years 1955 and 1957. Two weeks later, two Special Agents began an investigation of the tax results. An investigation by Special Agents is a well-known storm warning to the taxpayer that he is being investigated for tax fraud. January 25, 1960, the agents completed an investigation of the taxpayer for alleged evasion of income taxes. They recommended that criminal proceedings be brought for tax evasion for the years 1955, 1956, and 1957. The District Director forwarded the files to the Department of Justice and, after a reasonable time, the Department concluded that the taxpayer should be indicted for wilful attempt to evade his income tax as reflected by the following amounts:

Year	*Taxes Reported*	*Taxes Corrected*	*Taxes Attempted to Be Evaded*
1955	$3,192.24	$21,487.51	$18,295.27
1956	7,746.93	22,894.95	15,148.02
1957	0	4,347.97	4,347.97

[2]The complaint was filed on behalf of both Mr. and Mrs. Eastland We refer to the taxpayers in the singular, since J. M. Eastland is the sole taxpayer in the criminal proceeding and the principal taxpayer in the civil proceeding.

June 20, 1960, the Department of Justice forwarded the case to the United States Attorney for the *Eastern* District of Texas and instructed him to institute criminal proceedings against the taxpayer.

About the middle of June 1960 the taxpayer's attorney, Mr. Allen Pye, got in touch with Mr. Paul Brown, then United States Attorney for the Eastern District of Texas, and inquired if the Eastland file was "in the office for consideration for criminal prosecution". At that time the file had not been returned from the Department of Justice. Later, in the hearing on the motion for discovery, Mr. Brown testified that Mr. Pye "asked that when it was received and before the matter was presented to the Grand Jury, in the event we decided to present it to the Grand Jury, that he be given an opportunity to discuss the matter with me, and indicated at that time that there might be a plea of guilty", although Mr. Pye made no firm commitment as to such a plea. After the file came into the office June 27, 1960, Mr. Pye had two or three telephone conversations with the United States Attorney as to when the case would be presented to the grand jury. December 16 Mr. Brown and his successor, Mr. Tunnell, had a conversation with Mr. E. T. Moore, another of the taxpayers' attorneys, in the course of which Mr. Brown called Mr. Pye, and informed him that the case was being prepared for submission to the grand jury January 3, 1961, in Beaumont. He made an appointment with the taxpayer's attorneys fort he following day. At this conference, the two United States Attorneys "anticipated that the dicussion would be about a plea of guilty". The taxpayer's

attorney, however, said that "he was firmly convinced of Eastland's innocence" and felt that "if the United States Attorneys would go into the file more thoroughly" they would agree. Mr. Tunnell, the incoming United States Attorney, then agreed to "defer presenting it to the Grand Jury so that he could do just what Mr. Moore had asked him to do."

December 5, 1960, the Eastlands instituted an action in the *Northern* District of Texas for the tax refund claimed for 1955. Mr. Brown testified at the hearing on the discovery motion that notwithstanding this recent filing—just ten days before Mr. Moore's conference with the United States Attorneys for the Eastern District—Mr. Moore did not "at that time or any time, mention the fact that [the taxpayer] had filed a civil action". Mr. Tunnell also testified that there was no conversation relative to a civil action. In response to repeated questions from Mr. Moore, he said: "We were talking about whether this case was going to be submitted to a grand jury or not . . . I was not aware of your connection or anybody's else's connection with any civil action in this case." Mr. Tunnell, as the new United States Attorney, agreed to give the case the study suggested and to make an independent judgment on it. This would require deferring presentation of the case to the grand jury until it met again in March. This testimony underscores the fact that the taxpayer's attorneys in their dealings with the United States Attorney's office were interested only in the criminal case then about to be submitted to the grand jury. At the hearing Mr. Moore contradicted the testimony of the two United States Attorneys. He stated that at the outset of his confer-

ence he "told them that [he] had filed a civil action; that settling the civil liability was highly important."

The District Director filed his answer in the civil suit January 31, 1961, denying that a refund was due. He neither counterclaimed nor pleaded any affirmative defense. The answer contains no reference to any deficiency. *The taxpayer had not paid any deficiency; the tax deficiency had not even been assessed.*

February 13, 1961, the taxpayer filed a motion under Rule 34 for discovery. There was no pre-trial conference; the case was months and months distant from trial. The taxpayer asked for production of the following documents:

> "1. 'Any and all' reports of the Special Agents or of any other employee of the Internal Revenue Service made with respect to the examination of the taxpayers' returns for the years 1954 through 1957.
>
> 2. 'Any and all' written statements taken under oath by any agent or employee of the Service.
>
> 3. 'Any and all' written statements and documents received from certain employees of the taxpayers.
>
> 4. 'Any and all' documents pertaining to the failure of defendant to act upon the claim for refund."

The affidavit attached to the motion to produce asserted that the several taxable years were interrelated, because an adjustment in one year might affect the tax liability for every year at issue.

February 21, 1961, the District Director filed an answer stating:

> "That said files and documents in the custody of the United States Attorney for the Eastern District of

> Texas in connection with a criminal proceeding are privileged except as they might be ordered produced under the holding of Jencks v. U. S., 353 U. S. 657 or Title 18, U.S.C., Section 3500, relating to production of documents in criminal cases."

The answer pointed out that the case, having been recently filed, "is not set for trial, and in the normal sequence of events would not be reached for trial for several months". In addition, the Director asserted:

> "The tax refund suits such as this case are handled by attorneys from the Department of Justice, and since the filing of this motion on February 14, 1961, said attorneys have not had time to prepare an answer to said motion on the merits, or to come to Dallas for a hearing on the merits."

Accordingly, the defendant prayed for a stay of proceedings pending disposition of the criminal case.

The motion was filed in the District Court for the Northern District of Texas. That court transferred the action to the Eastern District of Texas.

March 21, 1961, a hearing was held on the taxpayer's motion to produce. We have previously referred to some of the testimony. The United States Attorney repeated his request for a delay in producing the submission of the criminal case to the grand jury. He and his predecessor testified, as noted, that in discussions with taxpayer's counsel there had been no mention of a civil suit for a refund; the taxpayer was interested in the criminal action only. On the record, the United States Attorney, although contradicted by one of the taxpayer's attorneys, made a good case for the point that the criminal action was more important than the civil action, even in the minds of the taxpayer's counsel.

It is a fair inference from the record that the filing of the suit for a refund, or at least the filing of the motion for discovery, was a tactical maneuver to enable the taxpayer to gain advance information on the criminal case. The trial judge himself entertained no duobts as to the motivation for discovery. During the hearing he asked one of the taxpayer's attorneys:

> *"What is the materiality of this stuff you want, except, to be honest about it, you want to see about your defenses in a criminal case?"*

In spite of this well-grounded suspicion, the trial judge concluded that if the civil suit were bona fide, it should be kept so independent of the criminal action that the criminal action should be ignored. This is the fatal defect in the proceedings below. The trial judge adopted the strict view that there "is nothing in this statute that exempts the operation of Rule 34 in a civil case by virtue of the fact that there might be a criminal case pending or a potential criminal case." He said:

> "I will say this: The argument about there being a potential criminal case or not, as made by the Government, doesn't appeal to me. It's a matter of materiality here as to whether or not I should let you look at the matters; because if this is a bona fide civil suit, then the rules of civil procedure govern it; and if it falls within Rule 34, then you are entitled to have those documents produced—I don't care whether a criminal action is pending or whether the Government wants to bring one or what."

On the materiality of the requested reports, the court was persuaded by the taxpayer's argument that a suit for re-

fund based on an operating loss carryback in effect puts in issue each item of income, deduction, and credit both in the year of loss and the years when the loss is carried; that here, the taxpayer could not be certain what adjustments the Government proposed to make and what issues the Government might raise.

After announcing his decision to grant the motion the trial judge remarked, apparently acknowledging the existence of a serious legal question, "I assume that the Government is going to refuse to let [the taxpayer] see [the records]". March 21, 1961, the trial judge entered an order directing that all the requested documents be produced at 2:00 P.M. the next day.

March 22, 1961, the District Director served a notice to take the deposition of the taxpayer on March 30, 1961. At the same time he filed a "Motion to Stay Order to Produce Pending Plaintiff's Compliance with Notice of Taking Deposition and Plaintiff's Giving Testimony". This motion alleged that the discovery order would require disclosure of the criminal file, that the Director anticipated Mr. Eastland would exercise his privilege against self-incrimination by refusing to reply to questions, that if this proved to be the case the District Director ought not to be compelled to comply with the Order to Produce. The taxpayer filed no answer to this Motion to Stay. The court summarily denied the motion the same day it was filed.

March 23, 1961, the taxpayer filed a Motion to Dismiss, moving that the court, "under Rule 37 of the Federal Rules of Civil Procedure, enter an order dismissing this action

with prejudice; that judgment be entered with costs for the defendant; and for such other and further relief as the Court may deem proper". The motion recited "as a basis for the relief" the refusal of the United States Attorney to comply with the Order to Produce, because of his being "under order from Mr. Fred Folsom of the Criminal Division of the Department of Justice not to comply with the court's order". The District Director's response was that he had no objection to dismissal of the complaint without prejudice to the rights of either party, or to dismissal with prejudice "provided that it is clearly understood that such action does not prejudice the United States with respect to any claim it may have against these plaintiffs."

At the hearing March 24, naturally enough, the trial judge was in doubt as to the reason for such a motion. The taxpayer's attorney stated that the reason was to cut off the Government's "tremendous counterclaim". This was the colloquy:

> "The Court: * * * I can't see how dismissing this lawsuit with prejudice would settle your tax liability for 1955.
>
> "Mr. Pye: Well, we want this judgment, of course, to cut off any right of counterclaim—to cut off any counterclaims or cross-actions that they may have against this Plaintiff; in other words, to settle this tax liability for 1955. It's the type of thing that we might end up settling it that way anyway; but under the circumstances we now find ourselves in, why, *we felt that this would be the best way to settle it.*
>
> "This settles it as far as he is concerned, Your Honor. *He doesn't have to worry about a tremendous counterclaim;* whether it has good basis for it or not. And when

are they going to bring it, if they are going to bring it."

Then, and no doubt to the surprise of even the taxpayer's attorney, whose motion had not asked for such action, the trial judge came up with the idea:

"Why wouldn't the proper thing be for the Court to strike their Answer in this case and enter judgment for the full amount of your suit?"

In reply, the United States Attorney stated, in part:

"I think the Court understands that I do not stand in defiance of this Court. I respectfully decline on the grounds asserted in this Order. I must assume responsibility for it, notwithstanding direction from higher officials, because the records are in my custody.

"But, I would pray the Court that no such harsh remedy be exercised against the United States Government that it could not later stand on the merits of any lawsuit—civil or criminal—that might be before the Court—and stand or fall with the merits of the case without regard to any wrongdoing upon the part of any agent of the Government that is personal in nature."

The Court held:

"Therefore, the Court thinks it is most ill-becoming of any party, and particularly an agency of the Government of the United States, not to obey a lawful order of the Court.

"Now, the Court feels that this is a lawful order. If it didn't, it never would have entered the order: And, therefore, I think that as drastic steps as are permitted under Rule 37 should be taken against the Government in this case; with the exception of I'm not going to put the United States Attorney or his Assistant in jail.

"I am not going to put Mr. Campbell in jail.

"If the Court were inclined to put anybody in jail it would be that man up in Washington that told you to disobey this Order.

"But now, of course, the Court has assumed at all times that the Plaintiffs filed this suit for refund in good faith. And I am not here disposed to do anything as to any criminal action that the Government might bring against them. That's independent.

"However, on the other hand, I will do such as I think I can do under this Rule 37 to prohibit the Government from asserting any civil liability against them."

Without hearing any evidence in support of the complaint, the district court entered a judgment March 25, 1961, denying the taxpayer's motion to dismiss, striking the District Director's answer from the record, and decreeing that the taxpayer receive the full amount claimed, $3,066.24, with interest and costs.

II.

In general, we agree with the view expressed by William D. Mitchell, former Attorney General, Chairman of the Advisory Committee that drafted the Federal Rules of Civil Procedure, in a statement often quoted:

> "It ought not to be necessary to resort to discovery against the Government * * * [for] the Government litigates with its citizens and ought to be frank and fair and disclose all the facts."[3]

There are times however when the Government, *because it is the Government*, must withhold or postpone full disclosure. This is such a time.

[3] Federal Rules of Civil Procedure, Proceedings of the Institute at Washington, D. C., Oct. 6, 7, 8, 1938.

A. In a mine-run civil case the discovery provisions of the Federal Rules of Civil Procedure apply to claims against the Government,[4] and courts have imposed sanctions upon the Government for disobeying orders to allow discovery. Usually, when the taxpayer is seeking a refund or resisting payment of a tax deficiency assessed against him the United States is just another litigant. In such cases we start with the feeling that fundamental fairness to both sides—the Government starts with a great advantage in investigative resources—requires recognition of the taxpayer's right to pre-trial discovery of the reports of the Internal Revenue Agents who examined the taxpayer's books and records.

However, all discovery rules exempt privileged matter[5] In the district court the Director first relied primarily on *Jencks v. United States*, 1957, 353 U. S. 657, 77 S. Ct. 1007,

[4] See 2A Barron and Holtzoff, Federal Practice and Procedure (Wright's Ed. 1961) § 651.1; 4 Moore, Federal Practice (1950) § 26.25. See also Berger and Krash, Government Immunity from Discovery, 59 Yale L. J. 1451 (1950); Comment, Developments in the Law-Discovery, 74 Harv. L. Rev. 940, 988, 1033-1042, 1051 (1961); Porter, Discovery Against the Government, 6 Prac. Lawyer 61 (1960); MacAskill and Snell, Scope of Discovery Against the United States, 7 Vand. L. Rev. 582 (1954); Miller, Availability and Use of Non-Public Government Records and Reports in Civil Litigation, 9 Syr. L. Rev. 163 (1958); Carrow, Government Nondisclosure in Judicial Proceedings, 107 U. Pa. L. Rev. 166 (1958); Note, Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 934-38 (1957); Speck, The Use of Discovery in United States District Courts, 60 Yale L. J. 1132 (1951).

[5] United States v. Procter & Gamble, 1958, 356 U. S. 677, 681, 78 S. Ct. 983, 2 L. Ed. 1077; United States v. Cotton Valley Operators Comm., W.D. La., 1949, 9 F.R.D. 719, aff'd by an equally divided Court, 1950, 339 U. S. 940, 70 S. Ct. 793, 94 L. Ed. 1356; O'Neile v. United States, E.D. Pa., 1948, 79 F. Supp. 827; Mitchell v. Bass, 8 Cir., 1958, 252 F. 2d 513.

[6] The privileges to which Rule 34 refers are common law, evidentiary privileges. United States v. Reynolds, 1935, 345 U. S. 1, 6, 73 S. Ct. 528, 97 L. Ed. 727.

1 L. Ed. 2d 1103, and the "Jencks" Act, 18 U.S.C.A. § 3500.[7] In the argument below and before this Court the Director took a broader position. He argues that considerations of public policy should prevail in order to prevent the civil discovery rules being subverted into a device for improperly obtaining discovery in the criminal proceedings. He argues that reports, especially the reports of the special agents (whose function is to investigate criminal aspects) necessarily include material protected by executive privilege and the works product-doctrine; and probably includes material protected from disclosure by the informer's privilege.

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[7] 18 U.S.C.A. § 3500 (P.L. 85-269, 71 Stat. 595), in part, provides:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

"[T]he legislative history of the Jencks Act 'reaffirms' [the Supreme Court's] holding in Jencks v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103. * * * The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is a special guardian." Campbell v. United States, 1961, 365 U. S. 85, 81 S. Ct. 421, 5 L. Ed. 2d 428. See also Clancy v. United States, 1961, 365 U. S. 312, 81 S. Ct. 645, 5 L. Ed. 2d 574.

(a) We do not know what material in the files may happen to be protected by the informer's privilege.[9] If there were any such material, it should have been protected by an appropriate exception to the order. (b) Executive privilege is narrowly confined to matters affecting the national security, such as military and state secrets. It may not be invoked lightly.[10] "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 1953, 345 U. S. 1, 73 S. Ct. 528, 532, 97 L. Ed. 27. There is no basis here for the claim of executive privilege.[11] (c) The "Jencks" Act, 18 U.S.C.A. § 3500, applies only to discovery in a criminal prosecution. It is important and relevant here with respect to good cause, because of the interrelation between the criminal proceeding which was about to be instituted and the case before us. (d) We would think that some of the reports or portions of the reports must come within the scope of the work-products doctrine.[12] See *United States v. Woodner*, S.D.N.Y., 1959, 24 F.R.D. 33. To obtain discovery of work-products, there must be an unusually strong showing

[9] The answer to the motion to produce does not allege that there was any matter protected by the informer's privilege. The appellant's brief, however, takes it for granted that discovery in this case would give access to the identity of informers and to information which they furnished the Government.

[10] Kramer and Marcuse, Executive Privilege—A Study of the Period 1953-1960, 29 Geo. Wash. L. Rev. 623, 827 (1961).

[11] The Government points out that only three days elapsed between entry of the order to produce and entry of judgment against the District Director; that therefore the Director did not have time to prepare a *formal* claim of executive privilege.

[12] Tolman, Discovery Under the Federal Rules; Production of Documents and the Work Product of the Lawyer, 58 Col. L. Rev. 498 (1958); Comment, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1027-1046 (1961).

of good cause to justify discovery of such writings; they are not absolutely privileged. *Hickman v. Taylor*, 1947, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451. The District Director, however, has never claimed absolute privilege; he has asked only that discovery be postponed. The real issue, therefore, is whether there was good cause for the order when and as it was issued.

B. What constitutes good cause varies from case to case. Two circumstances distinguish the situation here from the mine-run situation in discovery against the Government: (1) the interrelation of the civil action with the criminal action and (2) the absence of a deficiency assessment.

(1) There is a clear-cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. But these distinctions do not mean that a civil action and a criminal action involving the same parties and some of the same issues are so unrelated that in determining good cause for discovery in the civil suit, a determination that requires the weighing of effects, the trial judge in the civil proceeding should ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought. The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial

judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.

In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Compare Rules 26 through 37, Fed. R. Civ. P., with Rules 15, 16, and 17, Fed. R. Cr. P. Separate policies and objectives support these different rules.[15] Under Rule 16, Fed. R. Crim. P., the counterpart of civil Rule 34, limits discovery of documents and objects to those "obtained from or belonging to the defendant or obtained from others by seizure or by process". And 18 U.S.C.A. § 3500 does away with any pre-trial discovery of statements of a government witness. A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid

[15] "Traditionally, the narrow scope of discovery in criminal litigation is justified by three considerations which are said to be peculiar to criminal law. First, there has been a fear that broad disclosure of the essentials of the prosecution's case would result in perjury and manufactured evidence. Second, it is supposed that revealing the identity of confidential government informants would create the opportunity for intimidation of prospective witnesses and would discourage the giving of information to the government. Finally, it is argued that since the self-incrimination privilege would effectively block any attempts to discover from the defendant, he would retain the opportunity to surprise the prosecution where as the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant's existing advantages. The validity of each of these objections must be appraised in each of the situations in which the defendant may seek discovery and must be weighed against the importance to the defendant of the disclosure." Comment, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1052 (1961).

the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. In some situations it may be appropriate to say the civil proceeding. *United States v. Bridges*, N.D. Calif., 86 F. Supp. 931. In others it may be preferable for the civil suit to proceed—unstayed. In the proper case the trial judge should use his discretion to narrow the range of discovery. Here, however, the trial judge seemed to think that he had no discretion—once discovery was moved for in a civil suit.

A taxpayer about to be indicted for fraud carries a heavy burden when he asks to inspect the Government's criminal files containing reports especially prepared with criminal prosecution in mind. We are not talking about some vague suspicions that might in the future lead to a criminal charge. We are talking about a case the Department of Justice has decided should be instituted, and one that would have been submitted to the grand jury but for the urgent pleas of the taxpayer. The possibility of criminal prosecution was no news to the taxpayer; during 1959 the presence of the Special Agents put the taxpayer on notice. On the facts, the trial judge found—or expressed the opinion—that "to be honest about it" the purpose of the discovery was "to see about [the] defenses in a criminal case". There the proceedings should have ended, with dismissal of the motion or a stay of the proceedings.

Instead, the trial judge held that the suit for refund was a bona fide suit, and as such, it was completely "independent" of the criminal case. If a taxpayer files suit in bad faith, it is an abuse of process; but his good faith on a suit for refund does not sanctify the motion for discovery. We take the view that whether or not the suit, as distinguished from the motion, was bona fide, the effect of granting the motion was to give pre-trial discovery of documents denied the taxpayer in the criminal case. The order nullified the effect of section 3500. It was an open invitation to taxpayers under criminal investigation to subvert the civil rules into a device for obtaining pre-trial discovery against the Government in criminal proceedings.

(2) The District Director's motion to stay was based, in part, on the administrative policy against asserting tax deficiencies before development of the criminal case. At such time, after the criminal case had progressed, the issues would be clarified and the assessment of deficiencies would be a factor in considering a limited and timely discovery. At that time the taxpayer might more appropriately argue that it is the Internal Revenue Agents' knowledge of the particular aspects of the taxpayer's business which he is entitled to discover in order to have an understanding of the reason for the deficiency assessment; here, the argument was premature.

The taxpayer filed a complaint based on their own knowledge of their financial affairs. They had all the knowledge they needed for purposes of proving their case. In effect,

they asked for information on a counterclaim the defendant had not asserted.

These facts distinguish the case from *Frazier v. Phinney*, S.D. Tex., 1959, 24 F.R.D. 406[1] and *Commissioner v. Licavoli*, 6 Cir., 1958, 252 F. 2d 268. In those cases the civil action was the direct result of a tax deficiency; the District Director refused to give the taxpayers any information whatsoever concerning the basis of the deficiencies and penalties assessed against him. To the extent that this opinion differs from the opinions in *Frazier v. Phinney* and *Commissioner v. Licavoli*, we disapprove of those decisions. In *Frazier v. Phinney* the court said:

> "By assessing and collecting the alleged income tax deficiencies, penalties, and interest, defendant laid the necessary basis upon which plaintiffs could invoke the jurisdiction of this court. If defendant had not assessed and collected such amounts, he might contend that this court did not have jurisdiction and might refuse to discuss the basis for such alleged tax deficiencies until all criminal actions related there to have been disposed of. But by permitting plaintiffs to obtain the jurisdiction of this court, defendant gave them the right to proceed expeditiously with the adjudication of their tax liability and to use all discovery procedures permitted by the Federal Rules of Civil Procedure. Thus defendant cannot deny plaintiffs access to the requested agents' reports solely on the ground that they might obtain information and Government evidence intended for use in a

[1] "This is apparently the first reported case in which a taxpayer has secured the revenue agent's report. The fact that the district director refused to give the taxpayer any information whatsoever concerning the basis of the deficiencies and penalties assessed against him, gave him such a strong argument for production that it becomes difficult to evaluate the decision as precedent for future litigation in which the taxpayer may have more information but additional knowledge of the basis of the government's claims would aid his case." Note, 29 U. Cinn. 270, 271 (1960).

> pending criminal action. This motion for production of documents will be considered, therefore, solely upon established criteria under the Federal Rules of Civil Procedure."

We agree with the district court in attaching great weight to the assessment of tax deficiencies, although we are now considering it in its bearing on good cause rather than as a basis for jurisdiction. When the Government is the moving party and has made a claim for tax deficiencies it has elected, as in bringing an indictment in a criminal case, not to "leave the transactions in obscurity from which a trial will draw them, [but to] . . . expose them fully". *United States v. Andolschek*, 2 Cir., 1944, 142 F. 2d 503 (per Judge Learned Hand). "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. *Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.*" *United States v. Reynolds*, 1953, 345 U. S. 1, 12, 73 S. Ct. 528, 535, 97 L. Ed. 727.

In discussing good cause in *Phinney v. Kay* the court emphasized that the defendant had "refused even to discuss the matter or have a conference with [the plaintiffs] regarding the alleged tax deficiencies" and that "denial of production would unduly prejudice the preparation of plaintiffs' case and cause them hardship or injustice". That is not this case. Again it must be remembered that the Dis-

trict Director did not refuse to furnish the reports under a claim of absolute privilege. He asked only that discovery be deferred until a later and more appropriate time. There is nothing in the record to show that the taxpayer needed the information immediately or that he would have been prejudiced in his civil suit by a reasonable delay. As pointed out, the suit had been filed only recently, it was not on the trial docket and, in the normal course of events in the busy Eastern District of Texas, it was a long way from trial.

C. In concluding that on the facts the taxpayer failed to show good cause below, we are influenced by the scope of the order. The order requires the production for inspection and photographing of "any or all" revenue agents' reports pertaining to the basis for the deficiencies for the years 1954, 1955, 1956, and 1957. The reports prepared as part of a criminal investigation would necessarily contain information of importance in a criminal prosecution that would have no necessary relation to the refund claim but could not be physically separated in the files.

Limited discovery and other remedies were available which would not be vulnerable to improper inspection. Thus, the plaintiffs were clearly entitled to discovery of any documents obtained from the plaintiffs' files. By interrogatories under Rule 33, the plaintiffs could learn the names and addresses of persons having knowledge of relevant facts. By depositions under Rule 26, they could ascertain relevant facts known to the agents. The rationale for discovery is "to escape from the sporting theory of litigation towards the principle of an open proceeding in which surprise is minimized and the

opposing legal and factual positions are fully clarified for the enlightenment of the decision-maker."[14] There could be no question of surprise as to the facts, because the taxpayer's right to a refund depended on financial records in his possession and facts within his knowledge. The taxpayer could be surprised only by a contention the Government might make based on the Agents' legal interpretation of the facts. This then was a case that cried for a pre-trial conference (a form of discovery). At such a conference the issues could be clarified, to avoid surprise, but there would be no necessity for the Government to produce the confidential reports. After the criminal case had progressed, there would still have been time for other pre-trial conferences, if needed, and a limited discovery, without the delay prejudicing the civil case.

Summarizing, in balancing the individual's right to prepare his case promptly against the public interest in withholding the full disclosure sought here, the following elements tip the scales in favor of the District Director: (1) discovery would give the taxpayer possession of reports denied him in the criminal proceeding; (2) there is reason to think, "to be honest about it", that the motion for discovery (if not the suit for refund) was for the purpose of obtaining the otherwise unobtainable reports; (3) the Government was not the moving party seeking to recover while withholding information that might defeat recovery: it assessed no deficiency and asserted no counterclaim; (4) the District Director did not claim an absolute privilege but asked only

[14] Comment, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1028 (1961).

for a reasonable delay; (5) the record is bare of any showing that a reasonable delay would have prejudiced the taxpayer in the civil suit; (6) limited discovery by interrogatories and other remedies were available to the taxpayer; (7) the success of the taxpayer's suit depended on the truth or falsity of his own records and his knowledge of his own financial affairs; (8) the taxpayer filed a motion to dismiss with prejudice; (9) that motion to dismiss, following the Director's notice to take the taxpayer's deposition, raises a fair inference that the taxpayer, instead of making the same full disclosure he was asking from the Government, intended to claim his privilege against self-incrimination. In short, the taxpayer failed to show good cause for the order of discovery issued in this case.

III.

Right or wrong, the trial judge issued an order which the District Director declined to obey. The United States Attorney, however, acted under instructions from his superiors, made a good faith refusal, and respectfully explained his legal position to the Court. Notwithstanding the trial judge's indignation, therefore, we do not have before us a defiant litigant whose defiance, as an agent of the United States is particularly irresponsible and ill-becoming.

Rule 37 (b) provides the sanctions available when an order for discovery is disobeyed. In addition to an order based on contempt, the court may make such orders as are "just", including orders to: (1) take any fact as established for the purposes of the action; (2) refuse to allow the dis-

obedient party to support or oppose designated claims or defenses; (3) strike out pleadings, dismiss the action, or render a judgment by default against the disobedient party; and (4) direct the arrest of the disobedient party. Under Rule 55 (e) no default can be entered against the Government unless the claimant establishes his right to relief by satisfactory evidence.

The rules of law governing the interplay between Rule 55 (e) and Rule 37 (b) have not been firmly established. Rule 55 (e), which sets the focus for other subsections of this Rule, provides for the entry of a default judgment against a party who "has failed to plead or otherwise defend as provided by these rules." The thrust of this section is directed to instances when a party by neglect or inactivity has failed to prosecute or defend a suit. The suggestion that Rule 55 (e) may be limited to cases of inaction is strengthened by its origin. The provision derives from Title 28, former Section 763 which set forth the duty of the United States district attorney to file an answer in suits against the government when the complaint was served on him. Section 763 provided: "Should the district attorney neglect or refuse to file the answer or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court." The Third Circuit has declared that Rule 55 (e) does not apply to cases where the Government has filed its answer and defended vigorously, but it took care to buttress its affirmance of judg-

ment against the United States by pointing out that the trial court had not entered a true default judgment. *Reynolds v. United States*, 3 Cir., 1951, 192 F. 2d 987, 998, rev'd on other grounds, 1953, 345 U. S. 1, 73 S. Ct. 528, 97 L. Ed. 727. On the other hand, Professor Moore finds that Rule 55 (e) does restrict the sanctions provided by Rule 37 (b) *when the litigant involved is the Government*. 4 Moore, Federal Practice §§ 37.04, 6 Moore, Federal Practice § 55.12 (2d ed., 1953). See also *Jackson Buff Corporation v. Marcelle*, E.D.N.Y., 1957, 20 F.R.D. 139; Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 988-89. While recognizing that Rule 55 (e) limits Rule 37, Professor Moore provides an easy escape from the flat prohibition by asserting that a court could impose other sanctions against the Government under Rule 37 which would have the effect of establishing Government liability. *Reynolds v. United States, supra; O'Neil v. United States*, E.D. Pa., 1948, 79 F. Supp. 827, rev'd on other grounds, 3 Cir., 1949, 174 F. 2d 931. Such an interpretation provides the advantages of technical compliance without preventing the courts from enforcing their discovery orders.

Irrespective of the sweep of Rule 55 (e) itself, we feel that its underlying policy reaches the instant case. The Rule rests on the rationale that the taxpayers at large should not be subjected to the cost of a judgment entered as a penalty against a government official which comes as a windfall to the individual litigant. The private party must first demonstrate that there is some basis on which he is entitled on the merits of his claim to receive judgment. A court should ac-

cord respect to this policy beyond the confines of Rule 55 (e)'s strict coverage when it can do so without running against a countervailing consideration. The court took this position in *O'Neil v. United States, supra.* We agree with O'Neil. In the instant case the trial court's ruling did unnecessary violence to the policy against entering unsupported default judgments against the Government when it abruptly struck the Government's answer and entered judgment for the taxpayers at a hearing on a motion by the taxpayer for dismissal of his claim with prejudice. There is no shred of affirmative evidence in the record to support a recovery by the plaintiffs. In fact, on the record, there is a strong implication that the taxpayer, the District Director, the United States Attorney, and the trial judge himself recognized that the taxpayer *probably* owed more to the Government than the Government owed to him. In arguing for dismissal of his claim with prejudice the taxpayer virtually acknowledged that his purpose was to foreclose the Government from asserting any counterclaim. Considering that in final analysis the judgment was against the American taxpayers as a class, the plaintiffs should have been compelled to introduce their books, records, or some other evidence to show that they actually had suffered an operating loss; at the present we have only the plaintiffs' untested allegations as to the loss and its extent.

When the Government has refused to comply with discovery orders, as a sanction under Rule 37, the court may declare as established particular matters of fact which the private litigant might have established through evidence

obtained from the Government under the discovery procedures. Thus, in *Reynolds v. United States*, the widows of civilians killed in the crash of an Air Force plane were refused access to information concerning the crash. The court declared that the accident would be deemed to have resulted from the defendant's negligence. But it held a hearing to determine the extent of the widows' damages. Here, the plaintiffs did not show that they were dependent on information from the Government to prove their loss; they sought discovery for the purpose of anticipating collateral objections that the Government might raise. In some circumstances, in some cases, it might be an appropriate sanction under Rule 37 to prohibit the Government from raising collateral objections, but here the court should not have relieved the plaintiffs from proving those elements of their claim that were independent of the matters on which they sought discovery. Such a limit on the sanctions affords the Government a substantial protection against judgments on baseless claims. It is incumbent on a court under the spirit, if not the letter, of Rule 55 (e) to extend this measure of protection to the public on whom will fall the ultimate burden of an adverse judgment.

Rule 37 (b) provides a range of sanctions for the enforcement of discovery orders. And it vests discretion in the trial court in the selection of the particular sanction to use. This Court is reluctant to disturb an exercise of discretion by a trial judge, "but when we are convinced that the court below has exceeded a proper discretion in that the order imposed was too strict or was unnecessary under the circumstances,

we would be remiss in our duties if we did not set that order aside." *Syracuse Broadcasting Corp. v. Newhouse*, 2 Cir., 1959, 271 F. 2d 910, 915. In this case, we cannot escape the conclusion that the trial judge exceeded his judicial discretion in granting judgment for the plaintiff. He followed an unnecessarily broad discovery order with an undesirably stern sanction.[15] We believe that the ends of justice would best be served by remanding this case for a full trial on the merits. The civil suit should be given a second start. If the plaintiffs wish, they may submit a new motion for discovery. The merits of the motion will be unaffected by the complicating factor of a parallel criminal proceeding.

The judgment is REVERSED and REMANDED.

BELL, Circuit Judge, concurring specially:

I concur in the result only. My view is simply that the trial court abused its discretion under the facts in finding the necessary good cause for the production of the reports then in the criminal files of the United States attorney for

[15] As Judge Waterman said recently in a thorough study, "An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pre-Trial Orders, 29 F.R.D. 191, 421, 425: "I * * * begin with the assumption that federal district judges are men of high purpose who exercise authority in the best interests of justice as they see it. If this were not so, the wide range of discretion that was left to district judges by the Rules would not have been left to them. * * * [However, the] sanctions of dismissal and of judgment by default are severe sanctions, and appellate judges believe they would be remiss in their duties if they chose only to rubber stamp such orders of lower courts. To be sure, these drastic sanctions are indeed provided for by the Rules, but I am certain that the draftsmen did not propose that they should be used liberally in order to eliminate the actual trial of case. * * I suggest that appellate judges believe that a district judge should approach with hesitation the use by him of dismissal sanctions. Where an alternative, less drastic, sanction would be just as effective it should be utilized."

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use in the civil case. 4 Moore's Federal Practice (2nd ed.), § 34.04.

The criminal aspect of the matter could not be ignored. The end result was tantamount to allowing discovery under Federal Rules of Civil Procedure in a criminal proceeding, something we are powerless, as was the trial court, to authorize. The motion of the government to stay pending disposition of the criminal case should have been granted, and of course, all proceedings thereafter were nugatory.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By G. J. Ganuchian
Deputy

New Orleans, Louisiana
Oct. 11, 1962

(Seal)

No. 19,057

D. C. Docket No. 2868 Civil

ELLIS CAMPBELL, JR., District Director of Internal Revenue,

Appellant,

versus

J. M. EASTLAND and MONTEZ EASTLAND,

Appellees.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, J. M. Eastland and Montez Eastland, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 23, 1962